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7 **UNITED STATES OF AMERICA**  
8 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

9 PROVIDENCE HEALTH AND SERVICES -  
10 OREGON d/b/a PROVIDENCE PORTLAND  
11 MEDICAL CENTER,

12 Employer

13 and

14 SERVICE EMPLOYEES INTERNATIONAL  
15 UNION, LOCAL 49,

16 Petitioner

Case No. 19-RC-231425

EMPLOYER'S PETITION FOR  
REVIEW

17 Pursuant to Section 102.69(c)(2) of the National Labor Relations Board's Rules and  
18 Regulations, Providence Health & Services – Oregon d/b/a Providence Portland Medical  
19 Center (the “Employer” of “PPMC”) submits this Petition for Review of the Regional  
20 Director's Decision and Certification of Representation (the “Decision”) issued on April 11,  
21 2019.

22 **I. INTRODUCTION AND GROUNDS FOR REVIEW**

23 This petition for review arises from an election involving a putative unit of non-  
24 professional employees of the Employer comprising 838 members. The outcome of that  
25 election hinges on one disputed ballot, which contains an “X” in the “yes” box and a diagonal  
26 line (“/”) in the “no” box. The marks were independently sufficient to indicate preferences  
27 both for and against union representation. The ballot contained no additional marks clarifying

1 the voter's intent, and although there is modest smudging in the "no" box (but not smudging of  
2 the diagonal line itself), the ballot does not reflect an attempt to erase or obliterate either mark.  
3 At the election, the Board Agent declared the ballot "void." Contrary to the Board's repeated  
4 admonitions against attempting "to glean voter intent from ambiguous or contradictory  
5 markings on a ballot," *Daimler-Chrysler Corp.*, 338 NLRB 982, 983 (2003), and its mandate  
6 that a ballot is void unless the voter's intent is "free from doubt," *Bishop Mugavero Center*, 322  
7 NLRB 209 (1996), the Regional Director concluded the disputed ballot should be counted as a  
8 vote for union representation. That decision was in error and should be reversed.

9 Pursuant to Section 102.67(d), the Employer identifies the following grounds for  
10 granting its Petition for Review:

11 (1) The Regional Director's Decision departs from Board precedent;

12 (2) The Regional Director made a clear factual error in concluding that the ballot  
13 unambiguously reflected an intent to vote for representation and that error was prejudicial; and

14 (3) To the extent the Board concludes the Regional Director properly applied Board  
15 precedent concerning irregularly marked ballots, there are compelling reasons to reconsider  
16 those rules or policies.

17 *See* Board Rules § 102.67(d)(1-2, 4).

18 Accordingly, the Board should accept review of the Regional Director's Decision and  
19 declare the disputed ballot "void."

## 20 **II. RELEVANT FACTUAL BACKGROUND**

### 21 **A. The Election and Ballot 1.**

22 On December 12-13, 2018, the Board held a secret ballot election involving an all-  
23 nonprofessional bargaining unit at PPMC, an acute care hospital. The Tally of Ballots prepared  
24 at the conclusion of the election showed 374 votes cast for and 376 votes cast against the  
25 Petitioner, with 44 challenged ballots. Appendix A (Tally of Ballots). The Board Agent  
26 declared three ballots void, including the ballot at issue in this petition (identified by the  
27 Hearing Officer as "Ballot 1"). *See* Appendix B (Bd. Ex. 2). Ballot 1 displayed an "X" in the

1 “yes” box and a diagonal line (“/”) in the “no” box. Although there are faintly visible smudges  
2 in the “no” box, the diagonal line in the “no” box is clear, bold, but with a slight smudge  
3 beneath the slash mark. *Id.* At the vote count, the Employer expressed its position that Ballot 1  
4 was void, which the Board Agent indicated in writing on the ballot envelope. *See* Appendix C  
5 (Er. Ex. 2).

6 **B. The Second Tally of Ballots**

7 The parties each filed a variety of objections to the election, including objections  
8 concerning Ballot 1.<sup>1</sup> On January 30, 2019, the parties entered a stipulation resolving all  
9 objections except those related to Ballot 1 and a second ballot the Petitioner challenged as void  
10 (“Ballot 2”). Appendix D (Stipulation). The Board Agent opened and counted the remaining  
11 ballots, resulting in 383 votes for and 382 votes against union representation. Ballot 2, which is  
12 not being challenged in this petition, was found by both the Hearing Officer and Regional  
13 Director to be a vote against union representation. Appendix E-F (Hearing Officer Decision,  
14 Regional Director Decision). Thus, counting Ballot 2 as a “no” vote, the outcome of Ballot 1  
15 was outcome determinative, as counting Ballot 1 as a “yes” vote would give the Union a 1-vote  
16 margin (out of 765 votes counted), whereas invalidating Ballot 1 would create a tie, which  
17 would in all likelihood lead to another election. Appendix F (Decision, Revised Second Tally  
18 of Ballots).

19 **C. The Hearing Officer’s Decision**

20 The Hearing Officer concluded, notwithstanding the fact that Ballot 1 contained  
21 contradictory marks in the “yes” and “no” boxes, that Ballot 1 should be counted as a “yes”  
22 vote. The Hearing Officer rested her decision primarily on two speculative conclusions that:  
23 (1) “[t]he voter obviously knew how to make a clear X, as the instructions directed”; and (2)  
24 “[t]he only reasonable interpretation is that the smudged-over slash is an attempt at erasure.”  
25

26 <sup>1</sup> None of the other objections are at issue in this Petition for Review and, therefore, are not discussed in detail  
27 here.

1 Appendix E (Hearing Officer Decision at 7). For those reasons, the Hearing Officer counted  
2 Ballot 1 as a vote for representation.

3 **D. The Regional Director's Decision**

4 The Regional Director upheld the Hearing Officer's ruling on Ballot 1. The Regional  
5 Director stated that under Board law, an irregularly marked ballot will be counted so long as it  
6 "show[s] any unambiguous expression of voter intent." Appendix F (Decision at 4). Applying  
7 that standard, the Regional Director counted the ballot because "the smudging along the  
8 diagonal line in the 'no' box is an obvious attempt at erasure of an incomplete 'X.'" *Id.* at 5.  
9 The Regional Director held that that purported "obvious erasure" distinguished the ballot from  
10 those the Board found invalid in prior cases where a ballot contained an "X" in one box and a  
11 "/" in the other. *Id.* The Employer respectfully disagrees for the reasons discussed below.

12 This timely Petition to Review followed.

13 **III. ARGUMENT**

14 The Board should accept review of the Regional Director's Decision for three reasons.

15 **First**, the Regional Director applied the incorrect legal standard in divining the voter's  
16 intent. The Regional Director's statement that a ballot is counted if it shows "**any** unambiguous  
17 expression of voter intent" is incorrect and more relaxed than the Board's standard. Rather,  
18 Board law requires that a ballot be declared void if it contains contradictory marks (without  
19 regard to whether one is an "X" and one is a "/" ) unless there is a clear and unambiguous  
20 attempt to erase or obliterate one of the marks. *TCI West, Inc.*, 322 NLRB 928 (1997), enf.  
21 denied, 145 F.3d 1113 (9th Cir. 1998). And those instructions must be viewed against the  
22 overarching requirement that the voter's intent be "free from doubt." *Bishop Mugavero Center*,  
23 322 NLRB 209 (1996). The Regional Director's lesser requirement of "any unambiguous  
24 expression of voter intent" improperly lowered that exacting standard.

1           **Second**, the Regional Director made a clear factual error in finding that Ballot 1  
2 contains “an *obvious* attempt at erasure of an incomplete ‘X.’” That description is plainly  
3 inaccurate. The diagonal line itself is bold, unbroken, and un-smudged. And although there is  
4 some shading or smudging under the diagonal line, those markings are not consistent with—  
5 much less clearly caused by—an attempt at erasure. At best, the smudging presents  
6 inconclusive evidence of a possible (and plainly inadequate) attempt at erasure, which is not the  
7 sort of unambiguous markings that could establish the voter’s intent “free from doubt.” *Bishop*  
8 *Mugavero Center*, 322 NLRB 209 (1996). Thus, the factual conclusion that the shaded  
9 smudging in the “no” box was an “obvious” attempt to erase the diagonal line was erroneous.

10           **Third**, even if the Board’s precedent could be construed to allow a ballot to count with  
11 contradictory markings whenever there is *equivocal* evidence of a *possible* attempt at erasure,  
12 the Board should revisit its prior decisions and reaffirm its commitment to counting only ballots  
13 that unequivocally show the voter’s intent. Representation decisions, particularly those  
14 involving a large bargaining unit like the one here, should not be decided based on speculation  
15 that a voter might have unsuccessfully attempted to erase one of two conflicting marks. To the  
16 extent that is the standard under current Board law, that standard should be revisited and  
17 changed.

18           **A. The Regional Director’s Decision Departed from Established Board Law.**

19           The Regional Director failed to apply the strict standard for discerning voter intent from  
20 an irregularly marked ballot. It is well settled that “[i]t is not the Board’s role to glean voter  
21 intent from ambiguous or contradictory markings on a ballot.” *Daimler-Chrysler Corp.*, 338  
22 NLRB 982, 983 (2003). Under Board law, a ballot is void if the voter’s intent cannot be  
23 determined “free from doubt.” *Bishop Mugavero Center*, 322 NLRB 209 (1996). Thus, “where  
24 a voter marks both boxes on a ballot and the voter’s intent cannot be ascertained from other  
25 markings on the ballot (such as an attempt to erase or obliterate one mark), *the ballot is void*  
26 *because it fails to disclose the clear intent of the voter.*” *TCI West, Inc.*, 322 NLRB 928  
27 (1997) (emphasis added), enf. denied, 145 F.3d 1113 (9th Cir. 1998).

1 Applying that standard, the Board consistently voids ballots that contain marks in both  
2 the “Yes” and “No” boxes. In *TCI West*, the ballot at issue – like Ballot 1 – had a “single  
3 diagonal line” in the “Yes” box and an “X” in the “No” box. *TCI West, Inc.*, 322 NLRB 928  
4 (1997); *see also TCI W., Inc. v. N.L.R.B.*, 145 F.3d 1113, 1116 (9th Cir. 1998) (describing the  
5 same ballot as having “*one incomplete line in the ‘Yes’ box and a dark, obviously*  
6 *emphasized, complete ‘X’ in the ‘No’ box*”) (emphasis added). The Board declared the ballot  
7 *void*, reasoning that “although it is *possible* that the voter in this case intended to vote against  
8 union representation, the Board does not engage in speculation as to voter intent, but requires  
9 that the intent of the voter in marking the ballot must be clearly and unequivocally expressed.”  
10 322 NLRB at 928. *See also Bishop Mugavero Center*, 322 NLRB 209 (1996) (voiding ballot  
11 that contained a single diagonal line in the “yes” box” and an “X” in the “No” box); *Caribe*  
12 *Industrial & Electrical Supply*, 216 NLRB 168 (1975) (ballot that contained a vertical line in  
13 the “No” box and an “X” in the “Yes” box was void because the voter’s intent was not clearly  
14 expressed”).

15 With respect to Ballot 1, there is no question that the voter marked both boxes, which  
16 creates ambiguity. The only remaining question, therefore, is whether “other markings” on the  
17 ballot so “clearly and unambiguously” indicate a preference that the voter’s intent can be  
18 determined “free from doubt.” *See Bishop Mugavero*, 322 NLRB at 209 (voter’s intent *must*  
19 *be* “free from doubt”); *TCI West, Inc.*, 322 NLRB 928 (“[T]he Board does not engage in  
20 speculation as to voter intent, but requires that the intent of the voter in marking the ballot *must*  
21 *be clearly and unequivocally* expressed.”) (Emphasis added). That test plainly is not satisfied  
22 here.

23 Here, Ballot 1 has an “X” in the “Yes” box, and a “/” in the “No” box; while there  
24 appears to be a slight smudge in the “No” box, the Employer respectfully disagrees with the  
25 characterization that the line itself is “smudged.” To the contrary, the actual line in the “No”  
26 box is solid, unbroken, and arguably more sharp than the lines in the “Yes” box. And in any  
27 case, because a smudge can be as easily caused by “sweaty hands” as an eraser, “[t]he

1 determination of whether or not a voter has attempted erasure is just as subjective as  
2 determining the voter's intent." *TCI*, 145 F.3d at 1116. The Ballot contains no other markings  
3 to guide any interpretation of the voter's intent: no circle around one mark or the other; no  
4 apparent emphasis, such as several lines over one mark or the other; no scribbling over one  
5 mark or the other.

6 The lack of clear and unequivocal evidence of emphasis or a more obvious attempt to  
7 obliterate one mark or the other is determinative. *Mercy College*, 212 NLRB 925 (1974), is  
8 particularly instructive. That case involved a ballot with marks in both the "Yes" and "No"  
9 boxes with "heavy overshading" in the "No" box. Disagreeing with the Regional Director, the  
10 Board determined that the "heavy overshading" in the "No" box was not enough to show the  
11 voter intended to vote "Yes," reasoning that "the markings in either of the designated squares,  
12 absent the marking in the other square, would be considered a clear indication of the intent of  
13 the voter" and that the "heavy overshading" did not clearly express a preference for one mark  
14 over the other. The same is true here. The single, solid, deliberate diagonal line in the "No"  
15 box would be counted as a valid "No" vote under any circumstances. It is not rendered  
16 ineffective merely because there is also a valid mark in the "Yes" box. And the faint smudging  
17 around the diagonal line—like the heavy overshading—falls far short of establishing a clear  
18 voter intent to give emphasize one of the conflicting marks over the other.<sup>2</sup>

19 The Hearing Officer initially sought to distinguish *Mercy College* on the grounds that  
20 there had been an "X" in both boxes, whereas here there had been an "X" in the "Yes" box and  
21 a "/" in the "No" box. HOR at 7. But that reasoning is in direct conflict with the Board's  
22 holding in *TCI West*, where it voided a ballot with an "X" in one box and a "/" in the other.  
23 *TCI West, Inc.*, 322 NLRB 928. Indeed, the Board's decision in *TCI* rejects that notion,  
24 adopted by the hearing officer, that an "X" somehow trumps a "/" and instead held that  
25 "because the ballot was marked in both boxes, the Board, in its judgment, was unable to

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27 <sup>2</sup> It would defy logic that two independently valid marks made in both the "YES" and "NO" boxes voided the  
ballot in that case, but the two valid marks on Ballot 1 here could somehow clearly express the voter's intent.

1 ascertain the intent of the voter with the required degree of certainty, and concluded, consistent  
2 with precedent, that a ballot so marked should not be considered in determining the  
3 representation rights of the unit employees.” *TCI West*, 322 NLRB 928. The Regional  
4 Director, presumably recognizing the infirmity in the Hearing Officer’s ruling, did not adopt  
5 that reasoning. Instead, the Regional Director stated—in conclusory fashion and without  
6 meaningful analysis—that Ballot 1 was “distinguishable” from that *Mercy College* ballot and  
7 is instead more like the ballot in *Brooks Brothers*, 316 NLRB 176 (1995). Not so.

8 The ballot at issue in the *Brooks Brothers* case presented far clearer evidence of voter  
9 intent than Ballot 1. In that case, the ballot had an “X” marked in pencil in the “Yes” box  
10 “scratched over with additional pencil markings,” and a “clear” “X” in the “No” box. The  
11 Board found that the ballot clearly expressed the voter’s intent to vote “No” because the  
12 additional markings obliterated the “X” in the “Yes” box, and the voter left an unmistakable  
13 “X” in the “No” box. The voter’s affirmative effort to “scratch[] over” one of the marks with  
14 “additional pencil markings” made clear that he or she did not want that marking to be counted  
15 as a vote. A reasonable person in the voter’s position could submit that ballot knowing that by  
16 scratching out the mark in the “yes” box, the mark in the “no” box would be clearly understood  
17 as controlling.

18 The same cannot be said of Ballot 1. The faint smudging and shading that appears to be  
19 under the diagonal line may or may not have been caused by an eraser (unlike the markings  
20 “scratch[ing] over” the mark in the “yes” box). If it was an attempt to erase, it was so  
21 ineffective that no reasonable voter could have submitted the ballot believing that he or she had  
22 adequately expressed a preference to disregard the diagonal line in the “no” box. It is not the  
23 Board’s role to try to read a voter’s mind in an attempt to glean his or her intent where a voter  
24 made contradictory or ambiguous markings on a ballot.

25 A survey of cases where the Board found sufficient evidence to overcome the  
26 presumption of ambiguity where both boxes are marked reveals that far more than a subjective  
27 assessment of stray marks or an opinion as to whether an “X” trumps a “/” is required to

1 determine a voter's intent. For example, in *J.L.P. Vending Co.*, 218 NLRB 794 (1975), the  
2 Board found sufficiently clear evidence of voter intent where the ballot was "marked with a  
3 single diagonal line in the 'No' box, and *several diagonal lines, superimposed one on top the*  
4 *other*, in the 'Yes' box," as well as "clear" evidence of an attempt at erasure. *Id.* at 794  
5 (emphasis added). Here, there are no superimposed markings over the "X" in the "Yes" box  
6 and, in fact, the lines in both boxes are dark and pronounced (if anything, the slash in the "No"  
7 box is more solid than the X in the "Yes" box). And while the "/" in the "No" box on Ballot 1  
8 includes what can be described as a smudge<sup>3</sup>, it is far from "clear" that that resulted from an  
9 attempt at erasure or obliteration. Indeed, the fact that the voter submitted the ballot despite a  
10 dark, bold slash in the "No" box strongly indicates that the voter did not intend to erase it given  
11 that no reasonable person viewing the "/" could conclude that the erasure was adequate.

12 The Board's decision in *Osrham Sylvania, Inc.*, 325 NLRB 758 (1998), further  
13 underscores that "clear" voter intent requires more than just a smudge in one box. That ballot  
14 included a "smudged diagonal line" in the "Yes" box, and "7 'Xs' in the 'No'" area of the  
15 ballot, including a full 'X' in the 'No' box." *Id.* (emphasis added). Given the voter's obvious  
16 attempt to emphasize one mark over the other (repeating one mark seven times), the ballot was  
17 counted. Unlike the multiple "Xs" in the no area of the ballot in *Osrham Sylvania*, Ballot 1  
18 contains no markings whatsoever emphasizing the "X" in the "Yes" box.

19 The ballot in *Abtex Beverage Corp.*, 237 NLRB 1271 (1978), also contained evidence  
20 of intent that is not present in this case. In *Abtex*, the voter put an "X" in both boxes, but the  
21 "X" in the "No" box was "*scratched over with circular markings.*" *Id.* (emphasis  
22 added). Moreover, the voter in *Abtex* used a pen, meaning erasure was impossible; the Board,  
23 therefore, viewed the circular scratches over the "X" in the "No" box as an attempt to obliterate  
24 the mark. Thus, the Board found sufficient evidence of clear voter intent to count the ballot as  
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26 <sup>3</sup> The Employer has previously pointed out the common definitions for erasure and obliteration. The Employer  
27 respectfully submits that a faint smudge above, around, or beneath an intentional mark does not, alone, meet either  
definition.

1 a “Yes” vote.<sup>4</sup> Here, it is entirely speculative that the purported smudging of the “/” in the  
2 “No” box was caused by an attempt to erase. And even if the voter smudged the mark, the fact  
3 that the voter stopped there is enough to inject significant doubt regarding the voter’s intent.  
4 *See Bishop Mugavero Center*, 322 NLRB 209 (1996) (voter’s intent must be “free from  
5 doubt”). Indeed, if the voter truly meant to vote “Yes,” he or she could have made at least a  
6 marginally effective attempt to erase the diagonal line; or, as the voter did in *Abtex*, “scratched  
7 over” it; or, even talked with the Board Agent and asked for a new ballot as directed in the  
8 instructions. The voter did no such thing.

9  
10 *Mediplex of Connecticut*, 319 NLRB 281 (1995), is similarly distinguishable. In  
11 *Mediplex*, the Board adopted the ALJ’s finding—without independent analysis—that a double-  
12 marked ballot clearly expressed the voter’s intent to vote “No” where the “X” in the “No” box  
13 was “heavy, clear, more intense [than the marking in the “Yes” box], and contain[ed] a double  
14 line on one leg of the X,” while the “X” in the “Yes” box was “lightly marked” and “covered  
15 by the kind of smudges caused by an inadequate eraser.” Unlike in *Mediplex*, the diagonal line  
16 on Ballot 1 is not “lightly marked.” It is as clear and dark as the “X” in the “Yes” box and  
17 arguably is even more definitive. Ballot 1 also does not include additional markings on the “X”  
18 in the “Yes” box comparable to the “double line on one leg of the X” on the ballot at issue in  
19 *Mediplex*. And finally, in *Mediplex*, the record contained evidence that the pencil used during  
20 the election had a “worn eraser head,” which supported the inference that the voter intended to  
21 erase the mark in the “No” box even though he or she had done so inadequately. Here, there is  
22 no evidence concerning the quality of the erasers used at the election and no basis to believe  
23 that the smudge was, in fact, caused by an eraser.

24 Finally, the Seventh Circuit’s decision affirming the Board’s ruling in *Ruan Transp.*  
25 *Corp. v. N.L.R.B.*, 674 F.3d 672, 676 (7th Cir. 2012) further demonstrates that far more than a

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27 <sup>4</sup> Even with this comparatively clear indication of intent, two Board members (Jenkins and Murphy) still would  
have voided the ballot instead of engaging in speculation as to the voter’s intent. *Id.*

1 faint smudge is required to overcome the inherent ambiguity caused by conflicting marks. In  
2 *Ruan*, the voter marked both boxes with an “X.” But while the “X” in the “yes” box was clear,  
3 the “X” in the “no” box was “faintly visible,” had been “partially smudged and partially  
4 scratched out,” and “shaded or colored over by what appears to be a pink or purple highlighter  
5 with an ink color that is similar, but slightly darker, than the color of the pink ballot paper.” *Id.*  
6 at 674. That combination of factors—faintness of the “X,” a clear effort to scratch out the  
7 mark, smudging and use of a highlighter that nearly matched the color of the paper—was  
8 enough to conclude unequivocally that the voter intended to obliterate the mark. By contrast,  
9 the only supposed “evidence” the Regional Director found of erasure here was a slight smudge  
10 around and under the mark in the “no” box on Ballot 1.  
11

12  
13 Here, the two marks on Ballot 1 indicate conflicting preferences. Either an “X” or a “/”  
14 would be sufficient to discern the voter’s unambiguous intent. That is, either mark, *standing*  
15 *alone*, would have been deemed a valid vote. The voter who completed Ballot 1, however, left  
16 both marks intact. The voter made no additional indication—such as circling a mark,  
17 scratching out a mark, or spelling out “yes” or “no”—that could indicate a preference for one  
18 mark over the other that would be sufficient under Board law to determine intent. Without  
19 such evidence, there is no way to determine which of the two conflicting marks the voter  
20 intended to be controlling. Thus, assigning voter intent against or in favor of union  
21 representation based on Ballot 1 would require conjecture and speculation, which is precisely  
22 what Board precedent forbids.

23 At best, the contradictory marks indicate that the voter was ambivalent to the very end  
24 regarding union representation. In light of the Hearing Officer’s observation that the voter  
25 obviously read the instructions on the ballot and therefore he or she knew that the spoiled ballot  
26 should have been exchanged for a new one, an equally reasonable conclusion is that – for  
27

1 whatever reason – the voter deliberately cast an ambiguous ballot.<sup>5</sup> In these circumstances,  
2 Ballot 1 should be declared void.

3 The Regional Director’s decision relaxed the established legal standard for finding clear  
4 and unmistakable voter intent to a point not previously recognized by the Board. The Board  
5 has consistently required far more compelling evidence of voter intent in cases involving  
6 ballots with conflicting marks. No prior Board case has found clearly expressed voter intent  
7 based on such speculative interpretation of faint smudging in the area around an otherwise  
8 clear, bold and unadulterated mark. The Regional Director’s decision to do so here rested on  
9 an incorrect legal standard that lowered the bar for finding voter intent to a point of speculation  
10 and guesswork. Doing so was inconsistent with Board precedent and warrants review by the  
11 Board.

12 **B. The Regional Director’s Factual Finding that the Smudging Around the**  
13 **Diagonal Line in the “No” Box Was an “Obvious” Attempt at Erasing the**  
14 **Line Was Clearly Erroneous**

15 The Regional Director’s ruling rests largely on a demonstrably incorrect factual finding:  
16 that Ballot 1 displayed an “obvious” attempt by the voter to erase the diagonal line in the “no”  
17 box. The Employer respectfully submits that that finding inaccurately describes the ballot for  
18 three reasons.

19 *First*, the mere existence of smudging in the “no” box does not, of itself, indicate an  
20 attempt to erase the mark. The Ninth Circuit’s decision in *TCI W., Inc. v. N.L.R.B.*, 145 F.3d  
21 1113 (9th Cir. 1998), though not binding here, is instructive on this point. In the Court’s  
22 discussion of the inherent difficulties in discerning what constitutes an *attempt* at erasure, the  
23 Court posited a hypothetical that mirrors this case:

24 [W]hat if the voter cleanly erases only part of the mark, leaving  
25 half a line but erasing the rest so cleanly that the Board cannot  
26 detect the erasure and thus characterizes the ballot as containing  
27 two sufficient marks? *What if there is a slight smudge on the*

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<sup>5</sup> Notably, in this same election, another voter cast a ballot with marks in both boxes and, by agreement of the parties, that ballot was voided. See Appendix E (Hearing Officer Decision at page 4, fn. 8). It is reasonable to conclude that the voter who cast Ballot 1, like the voter who cast the voided ballot with an X in both boxes, was unable to decide whether to support union representation.

1                    *extra mark that the challenging party claims is an attempted*  
2                    *erasure but the Board concludes is merely a result of sweaty*  
3                    *hands?* The determination of whether or not a voter has attempted  
4                    erasure is *just as subjective as determining the voter's intent.*

5                    *Id.* at 1116. That is precisely the case here. The “smudging” in the “no” box could have as  
6                    easily been caused by a sweaty palm, a prior erasure followed by marking the diagonal line, a  
7                    drop of moisture on the ballot, or any number of other causes. The Regional Director’s  
8                    apparent assumption that any smudging in the vicinity of the diagonal line must reflect an  
9                    attempt at erasure is inconsistent with the applicable legal standard.

10                    **Second**, close analysis of Ballot 1 strongly suggests that the smudging was not caused  
11                    by an attempt to erase the diagonal line. Although there is some shading or smudging in the  
12                    “no” box, the diagonal line itself is *not* smudged. To the contrary, it is clear, dark, and  
13                    unmarred. Had the smudging in fact been caused by an eraser, the line itself would be smeared,  
14                    faint, blurry, or otherwise reveal some evidence that the voter tried to erase it. Given the clarity  
15                    of the line itself, one cannot reasonably conclude that Ballot 1 showed an “obvious” attempt at  
16                    erasure.

17                    **Third**, common sense dictates that if the voter had truly intended to erase the line in the  
18                    “no” box, he or she could not have believed that that goal had been accomplished when  
19                    submitting the ballot. No reasonable person who intended to erase the diagonal line would  
20                    have been satisfied that the line had been erased and his or her intent was clearly reflected. The  
21                    fact that purported attempt at erasure was entirely ineffective strongly suggests that it was not,  
22                    in fact, an attempt at erasure at all. Instead, the smudging was more likely than not caused by  
23                    some other factor.

24                    This factual error clearly had a prejudicial effect on the outcome. The Regional  
25                    Director’s entire decision depends on the erroneous finding that the voter made an “obvious”  
26                    attempt at erasure. Accordingly, the Board should accept review to reverse that error.  
27

1           C.     To the Extent the Regional Director Properly Applied Existing Board Law  
2                     Concerning Interpretation of Conflicting Marks on a Ballot, the Board  
3                     Should Accept Review and Modify that Standard.

4           As discussed above, the Employer believes the Regional Director misapplied existing  
5     Board precedent and effectively created a less stringent and, therefore, more subjective  
6     standard that assigns different values to what the Board would consider valid expressions of  
7     voter intent. More specifically, the Regional Director apparently has decided that an X  
8     indicates the voter's "true" intent, and cannot be seen as evidence of, for example, the voter's  
9     ambivalence. Given the Regional Director's approach here, and the resulting inconsistency of  
10    Board determinations that would give rise to more uncertainty in future elections, a more  
11    stringent standard is warranted.

12           A more appropriate standard would be to hold that ballots with marks in both the "yes"  
13    and the "no" boxes are presumptively void, and that presumption is overcome only where there  
14    is clear obliteration of one mark (in the true sense of that word) *and* additional evidence that  
15    leaves no doubt as to the voter's intent. Simply put, where the voter has gone to extraordinary  
16    lengths to discount or negate stray marks by, for example, scratching over the incorrect mark  
17    and circling one marked box or the other; writing "Yes" or "No" over the box the voter  
18    intended to check; or effectively removing any trace of the incorrect mark.

19           Such a standard would more faithfully adhere to the bulk of cases cited by the parties,  
20    the Hearing Officer, and the Regional Director. The one, but significant, difference would be  
21    that – if a voter chooses to ignore the Board agent's instructions, as well as the instructions on  
22    the ballot itself, to obtain a new ballot if the first is spoiled – that employee must do more than  
23    merely smudge one of the marks to indicate a preference for or against union representation.  
24    Thus, marks in both boxes, or marks that do not otherwise meet this standard should be taken  
25    as the voter's expression of ambivalence; the voter has indicated their desire to participate in  
26    the election, but by noting their indecision or perhaps casting a protest vote. *See, e.g., Daimler-*  
27    *Chrysler Corp.*, 338 NLRB 982, 983 (2003) (the Board is charged with "protect[ing] the right  
  of individual employees to choose whether or not to be represented by a union," and preventing

1 “speculat[ion] [ ]either to divine the intent of a ballot that is not clear, [or] to negate the intent of  
2 a ballot that is otherwise clear.”).

3 Moreover, the Board should not subjectively assign a preference, particularly where –  
4 as here – interpretation of a single voter’s intent results in a collective bargaining relationship  
5 that may not have the support of a majority of employees. *See Bishop Mugavero*, 322 NLRB at  
6 209 (voter’s intent **must be** “free from doubt”) (emphasis added); *TCI West, Inc.*, 322 NLRB  
7 928 (“[T]he Board does not engage in speculation as to voter intent, but requires that the intent  
8 of the voter in marking the ballot **must be clearly and unequivocally** expressed.”) (Emphasis  
9 added). The Employer respectfully submits that an issue of such great consequence—whether  
10 to certify a bargaining unit with more than 800 members—should not turn on guesses,  
11 conjecture, or speculation about a single voter’s intent where that intent is not “free from  
12 doubt” on the face of the ballot. *Bishop Mugavero Center*, 322 NLRB 209 (1996).

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Board should accept review of the Regional Director’s  
15 Decision.

16  
17 DATED this 25<sup>th</sup> day of April, 2019.

18 Davis Wright Tremaine LLP  
19 Attorneys for Providence Portland Medical Center

20 By \_\_\_\_\_  
21 Peter G. Finch  
22 N. Joseph Wonderly

1 “speculat[ion] [j]either to divine the intent of a ballot that is not clear, [or] to negate the intent of  
2 a ballot that is otherwise clear.”).

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5 that may not have the support of a majority of employees. See *Bishop Mugavero*, 322 NLRB at  
6 209 (voter’s intent **must be** “free from doubt”) (emphasis added); *TCI West, Inc.*, 322 NLRB  
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18 Davis Wright Tremaine LLP  
19 Attorneys for Providence Portland Medical Center

20  
21 

22  
23 By \_\_\_\_\_  
24 Peter G. Finch  
25 N. Joseph Wonderly  
26  
27



# **APPENDIX A**

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Date Filed

Case No. 19-RC-231425

11-20-18

PROVIDENCE HEALTH & SERVICES - OREGON d/b/a  
PROVIDENCE PORTLAND MEDICAL CENTER  
Employer

and

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 49  
Petitioner

Date Issued December 13, 2018

City Portland

State OR

Type of Election:  
(Check one:)

(If applicable check  
either or both:)

Stipulation

8(b) (7)

Board Direction

Mail Ballot

Consent Agreement

RD Direction  
Incumbent Union (Code)

### TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 838
2. Number of Void ballots 3
3. Number of Votes cast for PETITIONER 374
4. Number of Votes cast for \_\_\_\_\_
5. Number of Votes cast for \_\_\_\_\_
6. Number of Votes cast against participating labor organization(s) 376
7. Number of Valid votes counted (sum 3, 4, 5, and 6) 750
8. Number of challenged ballots 44
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 794
10. Challenges are (not) sufficient in number to affect the results of the election. OK
11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49

For the Regional Director

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

For PETITIONER

For \_\_\_\_\_

Un. 1

# **APPENDIX B**



**UNITED STATES OF AMERICA**  
**National Labor Relations Board**

19-RC-231425



**OFFICIAL SECRET BALLOT**

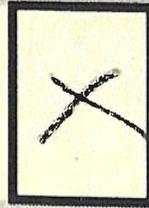
For certain employees of

**PROVIDENCE HEALTH & SERVICES - OREGON d/b/a**  
**PROVIDENCE PORTLAND MEDICAL CENTER**

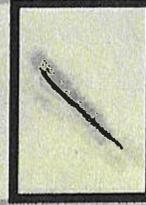
Do you wish to be represented for purposes of collective bargaining by  
**SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49?**

**MARK AN "X" IN THE SQUARE OF YOUR CHOICE**

**YES**



**NO**



**DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.**

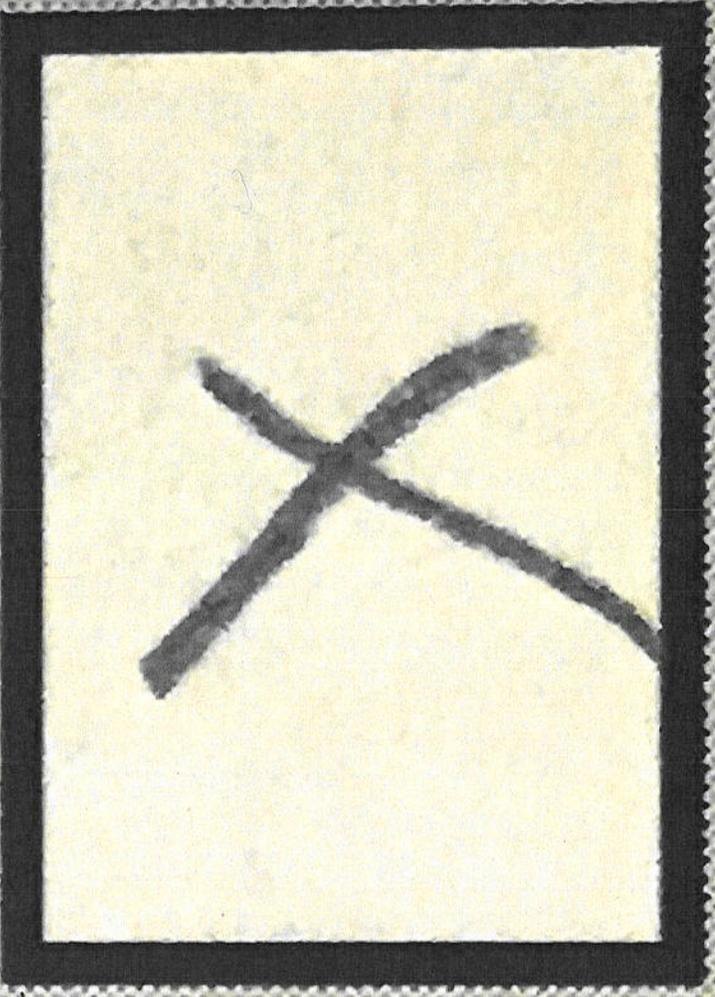
**If you spoil this ballot, return it to the Board Agent for a new one.**

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

BA Ex. 1

MIAMI

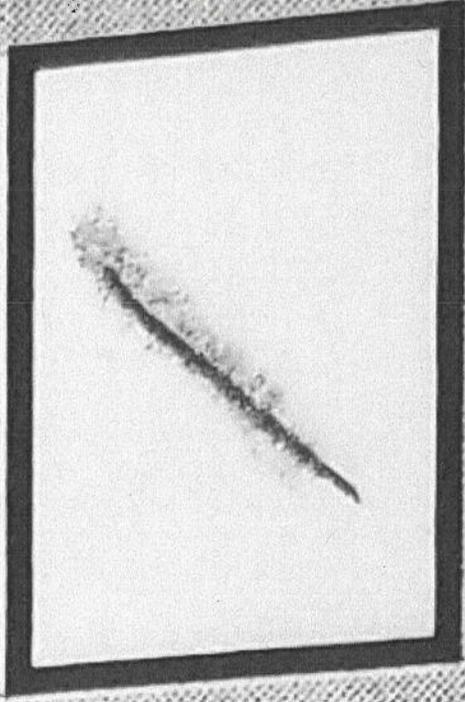
**YES**



**UNION LOCAL 49?**

**YOUR CHOICE**

**NO**



# **APPENDIX C**

IDENTIFICATION STUB

NAME VOID 2 of 3

CLOCK NO. \_\_\_\_\_ UNIT \_\_\_\_\_

JOB CLASS \_\_\_\_\_

COMPANY \_\_\_\_\_

POLLING PLACE \_\_\_\_\_ DATE \_\_\_\_\_

REASON FOR CHALLENGE \_\_\_\_\_

CHALLENGED BY BAAD/EP

BOARD AGENT h

PUT ADDITIONAL INFORMATION ON THE BACK OF THIS STUB

CHALLENGED BALLOT

RET: VALID BALLOT (yes)

EP: INVALID

MARKS (IN BOTH BOXES)

*mm*  
*kp*

Secret ENVELOPE

# **APPENDIX D**



ballots of Carla Gibson and Melinda Schlitt were challenged on the grounds that they are in the Rep-Patient Relations classification. The ballot of Thomas McClary was challenged on the grounds that he is in the Tech-Pharm Inventory/Purchaser classification. The ballots of Thomas Bednarz, Eddie Byrd, Kathy Davis, Andrew Ellis, John Gredler, Benjamin Hayes, Cindy Hildenbrand, Kristi Horton, Jason Jonah, Kylie MacArthur, Robert McClure, Conner Messing, Bonnie Moore, Colleen Nenow, Chi Nguyen, Samuel Palomino, Rohel Raj, Timothy Richards, David Thompson and Jason Williams were challenged on the grounds that they were in the Supply Chain Tech I classification.

4. The Board Agent challenged the ballots of Juliza Black, Allison Kennedy, Casey Pfluger, Rex Rodriguez, Eunice Stokes, Ernest Balonzo, Maria Lira, Pichnimoul Neang, Kayleigh Ramey, Laurie Jones, Melissa Hubbard, Blondell Jimmerson, Tashi Karstang, and Jannell Garnett on the grounds that their names did not appear on the Voter list.
5. On January 17, 2019, the Regional Director approved a Stipulation Resolving Challenged Ballots wherein the parties agreed that the ballots of Ashley Tracy and Rita Coss should not be counted.
6. On December 20, 2018, the Employer filed objections numbered #1 - #4 and #7 - #11, to conduct affecting the result of the election.
7. On January 30, 2018, the Employer filed amended objections, including one additional objection numbered #12, to conduct affecting the result of the election.
8. On December 20, 2018, the Petitioner filed sixteen (16) objections, numbered #1 - #16, to conduct affecting the result of the election.
9. Desiring to resolve this matter, the parties stipulate and agree that the Asst-Resource, Coord-Office, Coord-Pre Surg Info, Receptionist, Rep-Patient Relations and Tech-Pharm Inventory/Purchaser classifications are appropriately included within the bargaining unit as they are non-professional employees pursuant to the Board's Health Care Rule. As such, the parties agree and stipulate that the ballots cast by Janet Rust, Gary Groce, Patricia Barker, Amanda Heckmann, Carla Gibson, Melinda Schlitt, and Thomas McClary are eligible to vote in the election.
10. The parties further stipulate and agree that the ballot cast by Pichnimoul Neang should be counted as she was employed by the election eligibility date in a classification included in the bargaining unit.

Initials

KMC PGF

11. The parties further stipulate and agree that the ballot cast by Allison Kennedy, who is employed in the Qualified Mental Health Associate classification, should be counted and that this classification is appropriately included in the bargaining unit.
12. The parties further stipulate and agree that the ballots cast by Kayleigh Ramey, Melissa Hubbard, and Jannell Garnett, who are employed in the Pharm-Tech/Tech-Med History Pharm classification, should be counted and that this classification is appropriately included in the bargaining unit.
13. The parties further stipulate and agree that the ballots cast by Ernest Balonzo, Maria Lira, and Blondell Jimmerson should be counted as they were employed in classifications included in the bargaining unit.
14. The parties further stipulate and agree that the classification of Supply Chain Tech I should not be included in the bargaining unit as the Supply Chain Tech I classification is not a classification appropriately included in the bargaining unit. Accordingly, the parties stipulate and agree that the ballots cast by Thomas Bednarz, Eddie Byrd, Kathy Davis, Andrew Ellis, John Gredler, Benjamin Hayes, Cindy Hildenbrand, Kristi Horton, Jason Jonah, Kylie MacArthur, Robert McClure, Conner Messing, Bonnie Moore, Colleen Nenow, Chi Nguyen, Samuel Palomino, Rohel Raj, Timothy Richards, David Thompson and Jason Williams should not be counted.
15. The parties further stipulate and agree that the classification of Coord-Pharm Pyxis should not be included in the bargaining unit as the Coord-Pharm Pyxis classification is not a classification appropriately included in the bargaining unit. Accordingly, the parties stipulate and agree that the ballot cast by Sally Church should not be counted.
16. The parties further stipulate and agree that the ballot cast by Tashi Karstang should not be counted as she did not work the requisite hours prior to the eligibility date for the election.
17. The parties further stipulate and agree that the ballots cast by Juliza Black, Casey Pfluger, and Eunice Stokes should not be counted as they were hired after the eligibility date for the election.
18. The parties further stipulate and agree that the ballots cast by Rex Rodriguez and Laurie Jones should not be counted as they were not employees in a classification included in the bargaining unit.

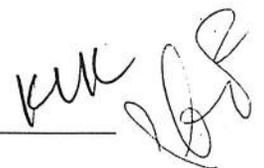
Initials

*KM PGF*

19. It is further agreed that, upon the approval of this agreement by the Regional Director, the ballots of Janet Rust, Gary Groce, Patricia Barker, Amanda Heckmann, Carla Gibson, Melinda Schlitt, Thomas McClary, Pichnimoul Neang, Allison Kennedy, Ernest Balonzo, Maria Lira, Kayleigh Ramey, Melissa Hubbard, Blondell Jimmerson, and Jannell Garnett will be opened and counted by the National Labor Relations Board Subregion 36 on January 30, 2019 and a Revised Tally of Ballots will issue.
20. Based on the above stipulations, the parties agree that the appropriate bargaining unit is:

All full-time, regular part-time and per diem non-professional employees employed by the Employer at its acute care hospital located at 4805 NE Glisan St., Portland, Oregon in the following classifications: Aide Perioperative 1, Aide Perioperative 2, Aide Rehab, Assoc Mental Hlth, Asst Food Svc 2, Asst Food Svcs, Asst Imaging Tech, Asst-Resource, Asst Sterile Processing, Attend Cleaning, Attend Cleaning Lead, Attend Housekeeping 2, Bed Control Coordinator, Buyer-Food, CNA 2, CNA 2 HUC, CNA 2 Med Surg, Cook, Cook Ld, Cook Prep Grill, Coord-Bed Placement, Coord-Food Svcs, Coord-Hlth Unit, Coord-Office, Coord-Pre Surg Info, Coord-Scheduler/Timekeeper, Coord-Scheduling, Coord-Scheduling LD, Coord-Specialty Scheduling, Coord-Staffing, Coord-Sterile Processing Svc, Diagnostic Imaging Support Specialist, Distributor Linen, Distributor Linen Ld, ED Support Spec, Ld-Food Nutrition, Medical Assistant Cert, Patient Escort, Patient Escort Ld, PBX Operator, Pharm-Tech/Tech-Med History Pharm, Phlebotomist, Phlebotomist 2, Qualified Mental Health Associate, Receptionist, Registrar, Scheduler-Diagnostic Imaging, Rep-Patient Relations, Scheduler-Diagnostic Imaging LD, Scheduler-Heart and Vascular, Spec-CV Scheduling, Spec-DI Support Lead, Spec-Floor Care, Spec-Mental Health, Spec-PT Dining, Spec-Surg Scheduling, Staffing/Unit Facilitator, Storekeeper-Nutrition Services, Tech Anesthesia Cert, Tech-1-Pharm Acute OC, Tech Anesthesia Ld, Tech Anesthesia Non Cert, Tech ECG/EKG, Tech ECG/EKG Senior, Tech Endoscopy, Tech ER, Tech Hemodialysis, Tech Monitor, Tech Monitor Ld, Tech Pharmacy, Tech-Pharm Inventory/Purchaser, Tech Sterile Processing 1, Tech Sterile Processing 2, Tech Videographer Equipment, Tech 1 Pharm Acute, Tech 2 Pharm Acute and Tech 3 Pharm Acute; but excluding all other non-professional employees, Supply Chain Tech I, Coord-Pharm Pyxis, professional employees, physicians, registered nurses, technical employees, business office clerical employees, skilled maintenance employees, managerial employees and guards and supervisors as defined by the Act.

Initials



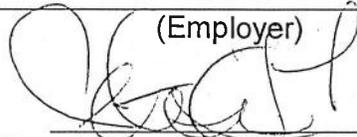
21. The parties further stipulate and agree that with respect to all the challenged ballots, except for those declared void by the Board Agent, they waive their rights to a hearing on these challenges, a Report on Challenged Ballots, the right to file exceptions to the Hearing Officer's Report on Challenged Ballots, and to a Board Decision on the above-described eligibility issues. The parties further waive their right to file any objections to the conduct of the election based upon this resolution of the determinative challenged ballots.
22. Upon approval of this Stipulation Resolving Challenged Ballots by the Regional Director, the Employer withdraws its objections #1 - #4 and #7 - #11, it filed on December 20, 2018.
23. Upon approval of this Stipulation Resolving Challenged Ballots by the Regional Director, the Petitioner withdraws objections #1 - #14 and #16 it filed on December 20, 2018.
24. The parties further stipulate and agree that the ballot showing an "X" marked in the "Yes" box and "X" marked in the "No" box, which was determined by the Board Agent to be a void ballot at the ballot count, is a void ballot.

Initials

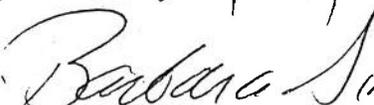
25. With respect to the remaining two ballots declared void by the Board Agent at the ballot count, the parties do not agree as to whether or not either one or both ballots are, in fact, void ballots, and maintain their respective positions to the Board Agent's decision in declaring them void. The status of these two ballots that were declared void by the Board Agent at the ballot count remains outstanding and unresolved.

**PROVIDENCE HEALTH & SERVICES –  
OREGON D/B/A PROVIDENCE  
PORTLAND MEDICAL CENTER**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 49**

By  (Employer)  
1.30.19  
(Name) (Date)  
Peter G. Frach, Atty

By  (Petitioner)  
1/30/19  
(Name) (Date)  
Kristen Kussmann, Attorney

Recommended:   
Barbara Simone (Date)  
1-30-19

Date  
approved 1/30/19  
Ronald K. Hooks, Regional Director

By:   
Jessica Dietz, Officer in Charge  
National Labor Relations Board

Initials 

# **APPENDIX E**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

PROVIDENCE HEALTH AND SERVICES -  
OREGON D/B/A PROVIDENCE PORTLAND  
MEDICAL CENTER,

EMPLOYER

and

Case 19-RC-231425

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 49

PETITIONER

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS  
AND RECOMMENDATIONS

I. INTRODUCTION

This report contains my findings and recommendations regarding two determinative challenged ballots, pursuant to an the Regional Director of Region 19's Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections, dated January 17th, 2019.

Both ballots at issue were declared void by an agent of the National Labor Relations Board (Board). As set forth in more detail below, I recommend the Petitioner's challenge to one of the ballots be sustained, and the Employer's challenge to one of the ballots be sustained.

II. PROCEDURAL HISTORY

Pursuant to a petition filed on November 20, 2018, and a Stipulated Election Agreement, an election was conducted on December 12 and 13, 2018, to determine whether the following unit of employees of Providence Health & Services Oregon d/b/a Providence Portland Medical Center (Employer) wished to be represented for purposes of collective bargaining by Service Employees International Union Local 49 (Petitioner or Union):

All full-time, regular part-time and per diem non-professional employees employed by the Employer at its acute care hospital located at 4805 NE Glisan St., Portland, Oregon in the following classifications: Aide Perioperative 1, Aide Perioperative

Providence Portland Medical Center  
19-RC-231425

2, Aide Rehab, Assoc Mental Hlth, Asst Food Svc 2, Asst Food Svcs, Asst Imaging Tech, Asst-Resource, Asst Sterile Processing, Attend Cleaning, Attend Cleaning Lead, Attend Housekeeping 2, Bed Control Coordinator, Buyer-Food, CNA 2, CNA 2 HUC, CNA 2 Med Surg, Cook, Cook Ld, Cook Prep Grill, Coord-Bed Placement, Coord-Food Svcs, Coord-Hlth Unit, Coord-Office, Coord-Pre Surg Info, Coord-Scheduler/Timekeeper, Coord-Scheduling, Coord-Scheduling LD, Coord-Specialty Scheduling, Coord-Staffing, Coord-Sterile Processing Svc, Diagnostic Imaging Support Specialist, Distributor Linen, Distributor Linen Ld, ED Support Spec, Ld-Food Nutrition, Medical Assistant Cert, Patient Escort, Patient Escort Ld, PBX Operator, Pharm-Tech/Tech-Med History Pharm, Phlebotomist, Phlebotomist 2, Qualified Mental Health Associate, Receptionist, Registrar, Scheduler-Diagnostic Imaging, Rep-Patient Relations, Scheduler-Diagnostic Imaging LD, Scheduler-Heart and Vascular, Spec-CV Scheduling, Spec-DI Support Lead, Spec-Floor Care, Spec-Mental Health, Spec-PT Dining, Spec-Surg Scheduling, Staffing/Unit Facilitator, Storekeeper-Nutrition Services, Tech Anesthesia Cert, Tech-1-Pharm Acute OC, Tech Anesthesia Ld, Tech Anesthesia Non Cert, Tech ECG/EKG, Tech ECG/EKG Senior, Tech Endoscopy, Tech ER, Tech Hemodialysis, Tech Monitor, Tech Monitor Ld, Tech Pharmacy, Tech-Pharm Inventory/Purchaser, Tech Sterile Processing 1, Tech Sterile Processing 2, Tech Videographer Equipment, Tech 1Pharm Acute, Tech 2 Pharm Acute and Tech 3 Pharm Acute; but excluding all other non-professional employees, Supply Chain Tech I, Coord-Pharm Pyxis, professional employees, physicians, registered nurses, technical employees, business office clerical employees, skilled maintenance employees, managerial employees and guards and supervisors as defined by the Act.

The tally of ballots prepared at the conclusion of the election on December 13 showed 374 votes cast for and 376 votes cast against the Union. There were 44 challenged ballots and 3 ballots declared void the Board Agent.<sup>1</sup>

The parties filed numerous challenges and objections.<sup>2</sup> On January 30, 2019, the parties reached a stipulation that resolved all matters except for two of the challenged ballots the Board Agent had declared void.<sup>3</sup> Pursuant to the stipulation, 15 previously-challenged ballots were

<sup>1</sup> The original tally is in the record as Petitioner's Exhibit 1.

<sup>2</sup> One of the employer's objections is in dispute, and is discussed and resolved below.

<sup>3</sup> The Petitioner's objection that was not resolved by the stipulation was Objection 15. That objection states, "The Board Agent failed to follow procedure for processing questionably marked ballots by deeming three ballots void, failing to segregate two of the three ballots as challenged, and allowing one ballot to be voided even though there was an "X" or other unmistakable designation in one square and a slight mark in the other square." Aside from what is discussed herein, the Petitioner offered no evidence or argument that the Board Agent failed to follow proper procedures with regard to ballots he declared void. Any objection beyond that the Board Agent erred by declaring the ballots at issue void is unsupported and therefore overruled.

Providence Portland Medical Center  
19-RC-231425

opened and counted on January 30. This resulted in a revised tally of ballots, with 383 votes cast for and 382 votes cast against representation by the Union.

Because the two remaining challenged ballots were potentially determinative, a hearing was held on January 31, 2019 in Portland, Oregon, before the undersigned, a duly designated hearing officer of the Board. The Employer and the Petitioner were represented by counsel during the hearing. All parties present at the hearing were afforded a full opportunity to be heard, to call and examine witnesses, and to introduce evidence on the issues to be considered.<sup>4</sup> The Employer and the Petitioner timely submitted briefs summarizing their positions on the issues.

### III. THRESHOLD PROCEDURAL ISSUE

Before analyzing the substantive issues with regard to the challenged ballots, I must resolve the procedural matter of whether the Employer timely objected to the ballot it seeks to challenge.

On January 30, 2019, prior to the hearing, the Regional Director, per his designee, permitted the Employer to amend its objections to include Employer's objection 12:

Without waiving any argument that it was not required to file, or that it has properly amended its Objections, the Employer objects to the consideration of a ballot the Board Agent initially and properly declared void. The Board Agent appropriately determined that the ballot was void because the voter's intent was unclear under the Board's established policy and case law.

At the hearing, I permitted the amended objection to proceed to the merits. (Tr. 12.)<sup>5</sup>

Prior to the amendment, the Employer had expressed intent to object to consideration of the void ballot as shown on the challenged ballot envelope. On that envelope, the Board Agent documented that the Petitioner believed the ballot was valid, and the Employer believed it was invalid. (Er. Exh. 1.) The Board Agent placed the ballots that had been declared void in the challenged ballot envelope.

On December 20, 2018, the Employer submitted a position statement to the Board. The Employer's position on the ballots declared void states:

---

<sup>4</sup> Neither party opted to call witnesses.

<sup>5</sup> The following abbreviations apply: "Tr." stands for "Transcript"; "Er. Exh." stands for "Employer Exhibit"; "Bd. Exh." stands for "Board Exhibit." Though I have cited to specific portions of the record, I emphasize that this recommendation is based on my consideration of the entire record.

Providence Portland Medical Center  
19-RC-231425

The Board Agent declared three ballots “void.” PPMC’s position is that one of those ballots —which clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot — should have been counted.

PPMC agrees with the Board Agent's determination that the other two ballots were “void” because the voter's intent was not clear.<sup>6</sup>

(Er. Exh. 2.) The Employer’s objections filed that same day, numbered 1-4 and 7-11, did not reference the void ballots at issue.

At the hearing, I instructed the parties to submit argument regarding their respective positions in their closing briefs. (Tr. 12.)<sup>7</sup> The Union asserts that, under the Board’s rules, the Employer’s objections were untimely. Specifically, Section under Section 102.60(a), objections must be filed within seven days of the tally of ballots. The Employer asserts that the ballot was challenged by the Board Agent, the Employer timely registered its objection to counting this ballot at the tally of ballots as shown by the challenged ballot envelope, and its position statement included its objections to the void ballots. Under the facts of this case, I agree that the Employer registered its objections in a timely manner, the amendment was properly granted and served to align form with substance, there has been no prejudice to the Union, and the matter has been fully and fairly litigated.

#### IV. THE CHALLENGED BALLOTS

##### *A. Facts*

As noted above, the relevant facts stem from two challenged ballots the Board Agent had declared void following the initial tally of ballots.<sup>8</sup> The ballots’ instructions state, in pertinent part:

Do you wish to be represented for purposes of collective bargaining by  
**SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49?**

**MARK AN "X" IN THE SQUARE OF YOUR CHOICE**

<sup>6</sup> As detailed in footnote 7, the parties ultimately agreed that one of these ballots was void.

<sup>7</sup> The transcript erroneously uses the word “debrief” instead of “brief” at p. 12, line 16. As intriguing as it may have been, I can say with certainty I never contemplated a debriefing with the parties after the hearing.

<sup>8</sup> A third ballot the Board Agent had declared void had a clear X in both the “yes” and “no” boxes, and the parties agreed it was void in the January 30, 2019 stipulation.

Providence Portland Medical Center  
19-RC-231425

(Bd. Exhs. 2, 3). Beneath these instructions are two boxes, side-by-side, the left-hand side box labeled “YES” and the right-hand side box labeled “NO”.

The first challenged ballot, which will be referred to as “Ballot 1” herein, contains an X in the “yes” box and a smudged diagonal line in the “no” box. (Bd. Exh. 2.) The second challenged ballot, which will be referred to as “Ballot 2” herein, contains an X in the “no” box, along with other markings in the shape of ovals in the “no” box, no markings in the “yes” box, and scribbling on the back of the ballot. (Bd. Exh. 3.)

### ***B. General Legal Principles***

In representation elections, the Board’s primary goal is to protect the right of individual employees to choose whether or not to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), enf. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). To effectuate that goal, the Board adheres to the following principles:

- The Board assumes, that by casting a ballot, the voter intended to participate in the election process and to register a preference;
- This preference must be given effect whenever possible; but
- The Board avoids speculation or inferences regarding the meaning of atypical “X”s, stray marks, or physical alterations

See *Daimler-Chrysler*, 338 NLRB 982, 982-983 (2003), and cases cited therein.

The Board will “count irregularly marked ballots whenever the intent of the voter is clearly apparent.” *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982); See also *Brooks Brothers, Inc.*, 316 NLRB 176 (1995) (Board “will count a ballot where, despite an irregularity in the manner in which it has been marked, it clearly expresses the voter’s intent.”)

By contrast, when a voter “marks both boxes on a ballot and the voter’s intent cannot be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark), the ballot is void because it fails to disclose the clear intent of the voter.” *TCI West, Inc.*, 322 NLRB 928 (1997), enf. denied, 145 F.3d 1113 (9th Cir. 1998); See also *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975); *Bishop Mugavero Center*, 322 NLRB 209 (1996).

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### *C. Ballot 1*

Ballot 1 contains an X in the “yes” box and a smudged diagonal line in the “no” box. The Petitioner argues that Ballot 1 conveys a “yes” vote. The Employer argues that it is void. I find the voter’s intent is clear from the ballot, and that the voter intended to vote “yes” for the Union. The single diagonal line in the “no” box has smudge marks consistent with an attempt at erasure, while the X in the “yes” box is clear and unambiguous.

Board caselaw is consistent that, when there is a clear marking in one box, and an attempt at erasure in the other, the voter intended to vote in accordance with the clear marking. For example, in *J.L. P. Vending Co.*, 218 NLRB No. 119 (1975), the ballot at issue was marked with a single diagonal line in the “no” box and several diagonal lines superimposed on each other in the “yes” box. Like here, the record showed there was an attempt to erase the single diagonal line. The Board held that by attempting to erase the single diagonal line in the “no” box, while making clear marks in the “yes” box, the voter showed an intent to vote for the union. See also *Osrsm Sylvania, Inc.*, 325 NLRB No. 147 (1998), (smudge mark on a diagonal line in the “yes” box indicated an attempted erasure, where the “no” box was marked with X and there were additional X markings in the “no” section of the ballot).

Even where there are X marks in both boxes, the Board will give effect to the ballot where the voter’s intent is clear. For example, in *Abtex Beverage Corp.*, 237 NLRB 1271(1978), the voter placed an X in both the “yes” and “no” boxes, but scratched over the X in the “no” box with circular markings. Noting the ballot was marked with a pen and could not likely be erased, the Board found that the voter intended to vote for union representation. In *Mediplex of Conn., Inc.*, 319 NLRB 281 (1995), the ballot at issue had smudged X in one box and a clear X in another. The Board adopted the administrative law judge’s finding that ballot at issue clearly expressed the voter's intent to vote “no” because the X in the “no” box was heavy and clear, while the X in the “yes” box was lightly marked and was “covered by the kind of smudges caused by an inadequate eraser.”<sup>9</sup> In *Brooks Brothers*, supra, the voter marked an X in both

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<sup>9</sup> Though the Board’s decision, other than affirming the administrative law judge, does not discuss the double-marked ballot, the Board has cited to *Mediplex* as precedent on this point. See, e.g., *Osrsm Sylvania, Inc.*, supra.

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boxes, but scratched over the X in the “yes” box with pencil markings. The Board found that this clearly expressed the voter’s intent to vote against the union.

The Employer cites to *TCI West*, supra, to support its contention that Ballot 1 is spoiled and therefore void. Like the instant case, the voter in *TCI West* had marked one box with an X and another with a single diagonal line. In that case, however, there was no evidence of an attempt to erase the diagonal line; in this case such an attempt is clear and creates a material distinction. The same holds true for *Bishop Mugavero Center* and *Carbie Industrial*, supra.

The Employer further argues that the Board’s decision *Mercy College*, 212 NLRB 925, 926 (1974), applies, and dictates a different result.<sup>10</sup> In that case, the ballot displayed a clear X in the “yes” square and a heavily shaded-over X in the “no” square. Here, however, there is not an X in both squares. Instead, there is a clear X in the “yes” square, and a smudged-over single diagonal slash in the “no” square. The only reasonable interpretation is that the smudged-over slash is an attempt at erasure. The voter obviously knew how to make a clear X, as the instructions directed, and did so convincingly in the “yes” box.<sup>11</sup>

Based on the foregoing, because Ballot 1 shows the voter intended to vote for the Union, I sustain the Petitioner’s objection, find it is not void, and therefore it should be counted as a “yes” vote in favor of the Union.

#### ***D. Ballot 2***

Ballot 2 contains an X in the “no” box, along with other markings in the shape of ovals in the “no” box, no markings in the “yes” box, and scribbling on the back of the ballot. The Employer asserts that the ballot conveys a “no” vote, as only the “no” box has markings, and the scribbles on the back of the ballot are not an identifying mark. The Petitioner argues this ballot is void because the irregular markings in and around the “no” box can reasonably be interpreted as an attempt to obliterate a diagonal mark in the “no” box. The Petitioner further argues that the back of the ballot contains an illegible signature, which is an identifying mark. I agree with the Employer, and find ballot 2 shows a clear intent to vote against union representation.

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<sup>10</sup> The Board cases relied on to support my decision post-date *Mercy College*, demonstrating the reaches of that decision as well as the fact-intensive inquiry required in each case.

<sup>11</sup> See *J.L. P. Vending*, supra, distinguishing *Mercy College* under circumstances similar to those present here.

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First, the only markings on the front of the ballot are in the “no” section. These markings are a fainter line and a fainter scribble in an oval shape as well as a darker scribble in an oval shape diagonally from bottom to top and couple of darker diagonal lines from top to bottom. The difference in shade along with the nature of the scribbles conveys a writing instrument that was initially only making faint marks until the writer scribbled to get it working better.

Significantly, there are no markings on the front of the ballot that are completely outside the “no” box and there are no markings whatsoever on the “yes” side of the ballot. In *Kaufman’s Bakery*, 264 NLRB 225 (1982), the Board stated, “In keeping with the Board’s long-established policy of attempting to give effect to voter intent whenever possible, we will hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter.” In that case, two ballots were marked with Xs along with some additional markings in the “yes” boxes, but there were no markings in the “no” boxes. The Board found that the irregularly-marked ballots demonstrated with reasonable certainty that the employees intended to vote for the Union. Similarly, the Board majority in *Daimler-Chrysler*, supra, found an intent to vote for the union where the voter placed an X in the “yes” square, but also placed a question mark next to the “yes” box.

The Union cites to *Hanson Cold Storage Co., v. NLRB*, 860 F.3d 911 (7th Cir. 2017), a case in which the Court of Appeals for the Seventh Circuit declined to apply the *Kaufman’s Bakery* presumption. In *Hanson Cold Storage*, the “yes” side of the ballot was marked with a large X, the center of which was in the upper left portion of the “yes” box and portions of which were both inside and outside of the “yes” box, as well as indecipherable scribbles both inside and outside of the box.<sup>12</sup> Even if Seventh Circuit’s caselaw, rather than Board caselaw, governed this analysis, the markings in *Hanson Cold Storage* are plainly more erratic than those present here, with many extending well into the instruction portion of the ballot, and they do not show the inconsistent shading present here. In any event, under extant Board law, I find Ballot 2 indicates the voter’s intent to vote against union representation.

Finally, the Union’s argument that the scribbles on the back of Ballot 2 contain an identifying mark is unconvincing. Ballots that are signed or may otherwise reveal the voter’s

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<sup>12</sup> The ballot at issue is contained in the body of the Court’s decision and I viewed it by accessing the decision on Westlaw.

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identity are invalid. See *Ebco Mfg., Co.*, 88 NLRB 983, 985 (1950)(ballot marked with a circled letter “R” invalid); *Standard-Coosa-Thatcher Company*, 115 NLRB 1790 (1956)(ballot marked with clear number “417” , which coincided with a clock number the employer had assigned to an employee, invalid). Here, the ballot is not signed, nor can any reasonable reading of it decipher the voter’s identity. The Union argues that the voter made a deliberate signature, as shown by the “swooping letter” starting at the left side. Even upon intense scrutiny, I was unable to identify a single letter on Ballot 2. Put simply, it is indecipherable scribble.

Consistent with *Kaufman’s Motors* and *Daimler-Chrysler*, I find that Ballot 2 shows the voter’s intent to vote against union representation. The long oval portions of the markings, all of which are on the “no” side and are at least partially inside the “no” box, are scribbles highly consistent with an attempt to get a writing instrument to work, and the scribbling on the back of the ballot is meaningless. Accordingly, Ballot 2 should be counted as a “no” vote, against representation by the Union.

## V. CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, I recommend that Ballot 1 be counted as a “yes” vote in favor of representation by the Union, and that Ballot 2 be counted as a “no” vote against representation by the Union. This brings the tally of ballots to 384 cast for the Union and 383 cast against the Union. Accordingly, I recommend that an appropriate certification issue.

### Appeal Procedure:

Pursuant to Section 102.69(c)(1)(iii) of the Board’s Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 19 by **Thursday, March 7, 2019**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be

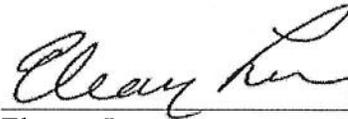
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addressed to the Regional Director, National Labor Relations Board, 915 Second Avenue, Suite 2948, Seattle, Washington 98174.

Exceptions and any supporting brief must be received by the Regional Director by 4:45 PM on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

DATED at Washington, D.C. 21<sup>ST</sup> day of February 2019



Eleanor Laws  
Administrative Law Judge

# APPENDIX F

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

PROVIDENCE HEALTH & SERVICES -  
OREGON d/b/a PROVIDENCE PORTLAND  
MEDICAL CENTER

Employer

and

Case 19-RC-231425

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 49

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on December 12 and 13, 2018 in a unit of non-professional employees of Providence Health and Services – Oregon d/b/a Providence Portland Medical Center (“Employer”). The tally of ballots showed that of the approximately 838 eligible voters, 374 cast ballots for Service Employees International Union Local 49 (“Petitioner”), and 376 cast ballots against representation. Further, there were three ballots declared void by the Board Agent and 44 challenged ballots determinative to the election results. Both parties filed subsequently filed objections.

On January 30, 2019, the parties reached a stipulation resolving all matters except their objections to two of the ballots the Board Agent declared void. Pursuant to the stipulation, 15 previously-challenged ballots were opened and counted on January 30, 2019, resulting in a revised tally of ballots showing that of the approximately 838 eligible voters, 383 cast ballots for the Petitioner and 382 cast ballots against representation. The two ballots declared void by the Board Agent remained potentially determinative to the election results and a hearing on objections was held on January 31, 2019 before a Hearing Officer. On February 21, 2019, the Hearing Officer issued a report in which she recommended sustaining both the Petitioner’s and Employer’s objections to the void ballots and issuing a certification of representation. Both parties filed exceptions to the Hearing Officer’s recommendations.<sup>1</sup>

The Hearing Officer’s rulings made at hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that the Petitioner’s objection regarding the validity of one ballot marked as void should be sustained. I also agree with the Hearing Officer

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<sup>1</sup> The following abbreviations will be used to refer to relevant documents and evidence, if applicable. The Employer’s Exceptions are “Exc.”; the Employer’s Exceptions Brief is “Exc. Brf.”; the Petitioner’s Answering Brief is “Ans. Brf.”; the Hearing Officers Report is “Report”; the Hearing Transcript is “Tr.”; Board Exhibits are “Bd. Ex.”; the Employer’s Exhibits are “Er. Ex.”; the Petitioner’s Exhibits were marked as “Union” exhibits and so are “U. Ex.”

that the Employer's objection regarding the validity of the other ballot marked as void should be sustained. I further find that the Hearing Officer did not err in finding that the Employer timely objected to the ballot it sought to contest. Accordingly, I am issuing a Certification of Representation.

## **I. BACKGROUND**

As described in the Report, the initial tally of ballots dated December 13, 2018 showed 44 challenged ballots and three ballots declared void by the Board Agent. The ballots declared void were secured in challenged ballot envelopes. The void ballots were secured in challenged ballot envelopes and the Report title mistakenly references challenged ballots. The two ballots at issue were void ballots and the Report, as well as this decision, address the parties' objections to the Board Agent's decision to void those ballots and their exceptions.

The void ballots are accurately described in the Report. The first void ballot, hereinafter referred to as "Ballot 1", contains an "X" in the "yes" box and a smudged diagonal line in the "no" box. (Bd. Ex. 2) The second void ballot, hereinafter referred to as "Ballot 2", contains an "X" in the "no" box and additional markings in the shape of ovals on the "no" box, some of which go outside the outline of the box. There are no markings in or around the "yes" box of Ballot 2 and there is scribbling on the back of the ballot. (Bd. Ex. 3)

The record reflects that the Board Agent wrote the parties' positions on the challenged ballot envelope used to secure Ballot 1. (Er. Ex. 1) The Petitioner's position was that it was a valid ballot and the Employer's position was that it was an invalid ballot. The record does not indicate what, if anything, was written on the challenged ballot envelope used to secure Ballot 2.

On December 20, 2018, the Petitioner timely filed objections numbered 1-16 with the Board. The Petitioner's objection identified as Objection 15 raises several objections, including an objection to the Board Agent's voiding of Ballot 1. (Bd. Ex. 1(b)) On December 20, 2018, the Employer timely filed its objections numbered 1-4 and 7-11. (Bd. Ex. 1(b)) None of the Employer's objections addressed the void ballots. However, on the same date, the Employer also timely filed a position statement with the Board, which addressed its position on the 44 determinative challenged ballots and the void ballots, stating the following:

The Board Agent declared three ballots "void." PPMC's position is that one of those ballots – which clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot – should have been counted.

PPMC agrees with the Board Agent's determination that the other two ballots were "void" because the voter's intent was not clear.

(Er. Ex. 2)

On January 30, 2019, I allowed the Employer to amend its objections to include an objection regarding the void ballots. The additional Objection 12 states in its entirety:

Without waiving any argument that it was not required to file, or that it has properly amended its Objections, the Employer objects to the consideration of a ballot the Board Agent initially and properly declared void. The Board Agent appropriately determined that the ballot was void because the voter's intent was unclear under the Board's established policy and case law.

The Employer immediately challenged the ballot as void, and preserved its position at the time of the count. The Employer's contemporaneous challenge and objection is clearly noted on the challenged ballot envelope provided by the Agency for just that purpose. Further, because the Board Agent properly treated the ballot as a challenged ballot, the Employer reiterated the basis for its challenge in its Statement of Position regarding the challenged ballots.

The basis for the Board Agent's determination, that the ballot was void because – like another ballot the parties stipulate is void – the voter marked both the “YES” and “NO” boxes of his or her ballot. That determination should be affirmed. As void, the ballot should not be counted.

(Bd. Ex. 1(d))

On January 30, 2019, the parties entered into a stipulation resolving all challenges and objections other than Petitioner Objection 15 and Employer Objection 12. (Bd. Ex. 1(e)) These objections were the only remaining issues before the Hearing Officer.

At the January 31, 2019 hearing before the Hearing Officer, the Petitioner withdrew all parts of Objection 15 other than its objection to the decision to invalidate as void Ballot 1, which was entered into the record as Board Exhibit 2.<sup>2</sup> (Tr. 10:13-24) Therefore, the two outstanding objections before the Hearing Officer were the Employer's Objection 12, and the Petitioner's Objection 15, limited to the decision to invalidate as void Ballot 1.

## **II. THE OBJECTIONS AND EXCEPTIONS TO THE HEARING OFFICER'S REPORT**

### **A. The Employer's Exceptions**

The Employer filed two timely exceptions to the Hearing Officer's Report, contending that: (1) the Hearing Officer failed to apply the Board's requirement “that the intent of the voter in

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<sup>2</sup> What the Hearing Officer designated as “Ballot 1” in her Report, and what I also refer to as “Ballot 1” in this decision, was identified in the hearing transcript as “void ballot 2 of 3” and entered into the record as Board Exhibit 2. The Hearing Officer helpfully clarified for the record that Board Exhibit 2 is the ballot that has an “X” in the “yes” box and a mark in the “no” box. (Tr. 10:19-24)

marking the ballot must be clearly and unequivocally expressed” and (2) the Hearing Officer erred by concluding that Ballot 1 should be counted as a vote in favor of unionization.

I find that the Hearing Officer did not fail to apply the appropriate Board standards in analyzing the ballots. I agree with the Hearing Officer that Ballot 1 shows clear intent to vote “yes” and therefore uphold the Hearing Officer’s decision to sustain the Petitioner’s objection, find that the Ballot 1 is not void, and count it as a “yes” vote in favor of the Petitioner.

The Board’s primary purpose in representation elections is to protect the right of individual employees to choose whether to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), enf. 192 F.2d 504 (6<sup>th</sup> Cir. 1951), cert. denied 343 U.S. 904 (1952). To accomplish that goal, the Board has developed principles concerning irregularly marked ballots. *In re Daimler-Chrysler Corp.*, 338 NLRB 982, 982 (2003). First, the Board assumes that by casting a ballot, a voter evinces an intent to participate in the election process and register a preference. Second, this preference must be given effect whenever possible. Third, the Board avoids speculation or inferences regarding the meaning of atypical “X’s, stray marks, or physical alterations.” *See Daimler-Chrysler*, 338 NLRB at 982-983, and cases cited therein.

In attempting to give effect to voter intent whenever possible, the Board will count irregularly marked ballots that show any unambiguous expression of voter intent. *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982). Ballots that are signed or otherwise identify the voter are invalid. *See Standard -Coosa-Thatcher Company*, 115 NLRB 1790 (1956); *Ebco Mfg., Co.*, 88 NLRB 983, 985 (1950). When a voter “marks both boxes on a ballot and the voter’s intent cannot be ascertained from other markings on the ballot (such as an attempt to erase or obliterate one mark), the ballot is void because it fails to disclose the clear intent of the voter.” *TCI West, Inc.*, 322 NLRB 928 (1997); see also *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975); *Bishop Mugavero Center*, 322 NLRB 209 (1996).

The Employer compares the Ballot 1 with the ballot in *TCI West, Inc.* While Ballot 1 is similar in its markings to those in *TCI West, Inc.*, it is critically different in that it has an additional erasure that was not present in *TCI West, Inc.* The Employer also argues that *Mercy College*, 212 NLRB 925 (1974) is instructive. In *Mercy College*, the challenged ballot had an “X” in the “yes” box but also had a discernable “X” in the “no” box that was heavily shaded over. The Board found that the ballot was not “free from doubt” because “the markings in either of the designated squares, absent the marking in the other square, would be considered a clear indication of the intent of the voter” and that the shading was inadequate to show that an attempt to obliterate that choice had occurred. *Id.* at 925; *Brooks Brothers, Inc.* 316 NLRB 176, 176 (1995).

However, the Board in *Brooks Brothers, Inc.* found that a ballot with an “X” in the “no” box but also an apparent “X” in the “yes” box scratched over with additional markings was valid. 316 NLRB at 176. The Board found that these markings were sufficient to provide a clear indication of the voter’s intent because the voter clearly obliterated the “X” in the “yes” box and left an “unmistakable “X” in the “no” box.” *Id.* In determining the validity of the ballot, the Board considered the *Mercy College* case and distinguished it as an instance in which “the Board found that the shading added to one side of the ballot was inadequate to show that an attempt to obliterate

that choice had occurred.” *Id.* Like the Board in *Brooks Brothers, Inc.*, I find *Mercy College* distinguishable from the situation at hand, and I agree with the Hearing Officer that the smudging along the diagonal line in the “no” box is an obvious attempt at erasure of an incomplete “X”. The ballot also contains an unmistakable “X” in the “yes” box. Therefore, it is possible to discern a clear expression of the voter’s intent based on the ballot’s irregular markings, and the Hearing Officer properly applied Board standards in determining the ballot to be a valid “yes” vote for representation.

### **B. The Petitioner’s Exceptions**

The Petitioner also filed two timely exceptions to the Hearing Officer’s Report. In its first exception, the Petitioner contends that the Hearing Officer erred in concluding that the Employer filed timely objections to the consideration of Ballot 1. I agree with the Hearing Officer that the Employer registered its objection to Ballot 1 in a timely manner for the reasons outlined in the Hearing Officer’s Report and set forth below.

At the tally of ballots, the Employer expressed its position that it considered Ballot 1 to be invalid as recorded on the outside of the challenged ballot envelope used to secure Ballot 1. On December 20, 2018, the Employer also stated its position on the void ballots in its timely-filed position statement on determinative challenged ballots but did not state its position on the void ballots in its objections filed on the same date. On January 30, 2019, I permitted the Employer to amend its objections, and the Employer added Objection 12 which stated its position on Ballot 1.

The Petitioner asserts that this amendment was untimely, citing to NLRB Rules and Regulations Section 102.69(a) which states that objections must be filed within seven days after a tally of ballots has been prepared. The Employer asserted, and the Hearing Officer found, that the Employer registered its objection to the ballot at the tally of ballots. Furthermore, the Hearing Officer determined that the amendment was properly granted and served to “align form with substance”, and that there has been no prejudice to the Petitioner by allowing the Employer to raise its objection to the consideration of the ballot.

I agree with the Hearing Officer that the Petitioner was put on notice that the Employer intended to object to consideration of the ballot at the tally of ballots and was also made aware of the Employer’s position regarding Ballot 1 in the Employer’s position statement that was timely filed on December 20, 2018. Therefore, the Petitioner was not prejudiced by the Employer’s later amendment to its objections. Given that the Employer had noted its position on the validity of the void ballot twice in timely, if not entirely procedurally correct, manners I find that the interests of justice and fairness were properly furthered by permitting the Employer to amend its objections.

The Petitioner also contends that the Hearing Officer erred in concluding that Ballot 2 should be counted as a “no” vote against representation. The Petitioner argues that the ballot is void because the markings on the ballot provide no clear indication of the voter’s intent and because the ballot contains a signature.

Although Ballot 2 was not specifically objected to in either parties' remaining objections, the issue was raised in hearing. Both parties argued their positions on this ballot to the Hearing Officer and briefed their position on the validity of Ballot 2. In light of this and my determination that there is no harm to the parties in so doing, I will address the validity of Ballot 2 despite neither party including it in their objections as written.<sup>3</sup>

I agree with the Hearing Officer's determination that Ballot 2 contains an unambiguous expression of voter intent, and therefore should be counted as a valid vote against representation. Notably, there are no markings on the "yes" side of the ballot and there are no markings that are completely outside of the "no" box. All the markings made on the front-side of the ballot intersect with the "no" box. While the markings are irregular, they are in the general shape of an "X", and there is nothing indicating that the voter intended to revoke his or her choice through the additional markings. In *Kaufman's Bakery Inc.*, the Board "regard[ed] a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter." 264 NLRB 225, 225 (1982). I agree with the Hearing Officer's determination that *Hanson Cold Storage Co. v. NLRB*, 860 F.3d 911 (7<sup>th</sup> Cir. 2017), even if controlling, is distinguishable because it addressed more erratic markings than those present here. I further agree that under exigent Board law, Ballot 2 indicates the voter's intent to vote against representation. I also agree with the Hearing Officer that the scribbles on the back of Ballot 2 do not contain any identifying mark and the ballot is therefore not void for that reason. Accordingly, I affirm the Hearing Officer's recommendation that Ballot 2 be counted as a "no" vote against representation.

### **III. CONCLUSION**

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations and the exceptions and arguments made by the Petitioner and the Employer, I affirm the Hearing Officer's recommendation to sustain the objections. I attach hereto a Second Revised Tally of Ballots, and with 384 votes cast for Petitioner and 383 votes cast against, Petitioner has received a majority of the valid votes cast. I shall therefore certify the Petitioner as the representative of the appropriate bargaining unit.

### **IV. CERTIFICATION OF REPRESENTATIVE**

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots have been cast for Service Employees International Union Local 49, and that it is the exclusive representative of all the employees in the following bargaining unit:

All full-time, regular part-time and per diem non-professional employees employed by the Employer at its acute care hospital located at 4805 NE Glisan St., Portland, Oregon in the following classifications: Aide Perioperative 1, Aide Perioperative 2, Aide Rehab, Assoc Mental Hlth, Asst Food Svc 2, Asst Food Svcs, Asst Imaging Tech, Asst-Resource, Asst Sterile Processing, Attend Cleaning, Attend Cleaning

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<sup>3</sup> I note that the Petitioner originally included a reference to Ballot 2 in its objection numbered 15 but withdrew this portion of the objection at the hearing.

Lead, Attend Housekeeping 2, Bed Control Coordinator, Buyer-Food, CNA 2, CNA 2 HUC, CNA 2 Med Surg, Cook, Cook Ld, Cook Prep Grill, Coord-Bed Placement, Coord-Food Svcs, Coord-Hlth Unit, Coord-Office, Coord-Pre Surg Info, Coord-Scheduler/Timekeeper, Coord-Scheduling, Coord-Scheduling LD, Coord-Specialty Scheduling, Coord-Staffing, Coord-Sterile Processing Svc, Diagnostic Imaging Support Specialist, Distributor Linen, Distributor Linen Ld, ED Support Spec, Ld-Food Nutrition, Medical Assistant Cert, Patient Escort, Patient Escort Ld, PBX Operator, Pharm-Tech/Tech-Med History Pharm, Phlebotomist, Phlebotomist 2, Qualified Mental Health Associate, Receptionist, Registrar, Scheduler-Diagnostic Imaging, Rep-Patient Relations, Scheduler-Diagnostic Imaging LD, Scheduler-Heart and Vascular, Spec-CV Scheduling, Spec-DI Support Lead, Spec-Floor Care, Spec-Mental Health, Spec-PT Dining, Spec-Surg Scheduling, Staffing/Unit Facilitator, Storekeeper-Nutrition Services, Tech Anesthesia Cert, Tech-1-Pharm Acute OC, Tech Anesthesia Ld, Tech Anesthesia Non Cert, Tech ECG/EKG, Tech ECG/EKG Senior, Tech Endoscopy, Tech ER, Tech Hemodialysis, Tech Monitor, Tech Monitor Ld, Tech Pharmacy, Tech-Pharm Inventory/Purchaser, Tech Sterile Processing 1, Tech Sterile Processing 2, Tech Videographer Equipment, Tech 1Pharm Acute, Tech 2 Pharm Acute and Tech 3 Pharm Acute, but excluding all other non-professional employees, Supply Chain Tech I, Coord-Pharm Pyxis, professional employees, physicians, registered nurses, technical employees, business office clerical employees, skilled maintenance employees, managerial employees and guards and supervisors as defined by the Act.

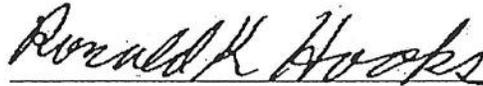
#### V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by April 25, 2019. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Providence Health & Services - Oregon d/b/a  
Providence Portland Medical Center  
Case 19-RC-231425

Dated at Seattle, Washington, this 11<sup>th</sup> day of April, 2019.

A handwritten signature in black ink that reads "Ronald K. Hooks". The signature is written in a cursive style and is positioned above a horizontal line.

Ronald K. Hooks, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174-1078

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

PROVIDENCE HEALTH & SERVICES - OREGON d/b/a  
PROVIDENCE PORTLAND MEDICAL CENTER  
Employer

and

SERVICE EMPLOYEES INTERNATIONAL UNION  
LOCAL 49  
Petitioner

Case No. 19-RC-231425

Date Issued April 11, 2019

TYPE OF ELECTION: (Check one:)

- Consent Agreement
- Stipulation
- Board Direction
- RD Direction

(Also check box below where appropriate)

8(b) (7)

**SECOND REVISED TALLY OF BALLOTS**

(Counting of Challenged Ballots)

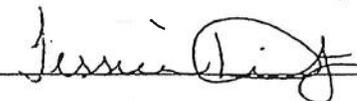
The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director on April 11, 2019 and the addition of these ballots to the Revised Tally of Ballots, executed on January 30, 2019, were as follows:

	Revised Tally	Challenged Ballots Counted	Second Revised Tally
Approximate number of eligible voters	<u>838</u>		
Number of Void ballots	<u>3</u>		<u>1</u>
Number of Votes cast for <u>Petitioner</u>	<u>383</u>		<u>384</u>
Number of Votes cast for _____			
Number of Votes cast for _____			
Number of Votes cast against participating labor organization(s)	<u>382</u>		<u>383</u>
Number of Valid votes counted	<u>765</u>		<u>767</u>
Number of undetermined challenged ballots	<u>0</u>		<u>0</u>
Number of Valid votes counted plus challenged ballots	<u>765</u>		<u>767</u>
Number of Sustained challenges (voters ineligible)			

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election. A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for \_\_\_\_\_

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49

For the Regional Director



The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For EMPLOYER  
Not Present

For \_\_\_\_\_

For PETITIONER  
Not Present

For \_\_\_\_\_

